

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7454 76-7480

To be argued by
MELVYN ALTMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

BIG SEVEN MUSIC CORP. and ADAM VIII, LTD.,

Plaintiffs-Appellants,

against

JOHN LENNON, APPLE RECORDS, INC., HAROLD SEIDER,
CAPITOL RECORDS, INC. and EMI RECORDS LIMITED,

Defendants-Appellees.

and

MORRIS LEVY,

Additional Defendant
on Counterclaims-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT MORRIS LEVY

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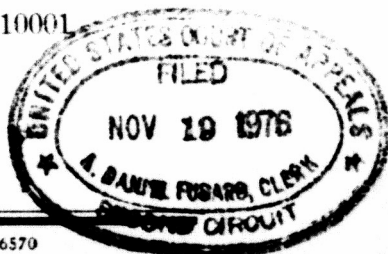


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BRIEF FOR APPELLANT MORRIS LEVY

Preliminary Statement

Additional Defendant on Counterclaim Morris Levy ("Levy") appeals from so much of a final judgment (A. 258a),* entered August 10, 1976 in the United States Dis-

* References to the Appendix will be preceded by the letter "A" and references to material in the first volume of the Appendix will be succeeded by the letter "a". References to plaintiffs' exhibits will be preceded by "PX" and defendants' exhibits by "DX". Page references to exhibits which have been included in the Appendix will be preceded by "E".

trict Court for the Southern District of New York (Judge Thomas P. Griesa), as:

1. Dismissed plaintiffs' claims for breach of contract and determined that Big Seven Music Corp. ("Big Seven") and Adam VIII, Ltd. ("Adam VIII") were not authorized to release a phonograph album recorded by John Lennon ("Lennon"); and

2. Awarded compensatory and punitive damages totaling \$419,800* plus interest and injunctive relief against Adam VIII and Levy on certain defendants' counterclaims.

Big Seven and Adam VIII are filing a separate brief** which deals primarily with their contention that the trial court erred both in holding that they had failed to prove that Lennon and Apple Records, Inc. ("Apple") had, on October 8, 1974, licensed them to manufacture, promote and sell a rock and roll album recorded by Lennon, and in failing to award certain relief with respect to Big Seven's alternative claim that Lennon had breached a 1973 settlement of an earlier lawsuit.

The trial court's award of compensatory and punitive damages and injunctive relief against Adam VIII and Levy was predicated on its holding that Big Seven and Adam VIII had not obtained a license for the Lennon album and that its release, promotion and sale were accordingly unauthorized. To avoid duplication, Levy respectfully joins in the separate brief filed on behalf of Big Seven and Adam VIII seeking to reverse that holding.

If this Court should reverse Judge Griesa's decision that no license was granted on October 8, 1974, then the award

* The trial court originally awarded \$429,200 but after Adam VIII and Levy moved, pursuant to Rules 52(b) and 59(a) to amend the trial court's findings and conclusions, and for a new trial, Lennon stipulated that his damage award should be reduced by \$9,400, an amount (payable to the American Federation of Musicians) which Adam VIII and Levy contended defendants had failed to take into account in computing their expenses and lost profits and royalties.

** The separate brief of Big Seven and Adam VIII describes the proceedings below and the settlement between Big Seven, Adam VIII and Levy and Capitol and EMI.

of damages on defendants' counterclaims against Adam VIII and Levy should also be reversed, because the trial court's holding of liability on the counterclaims was based on its decision on the contract issue.

Even if this Court should affirm the decision on the contract question, we respectfully submit that it should nevertheless reverse the district court's award of compensatory and punitive damages and the injunction against Adam VIII and Levy for the reasons set forth in this brief.

Levy does not contend that as the President and principal stockholder of Adam VIII he should be treated differently from his corporation in a tort case and he requests that this Court grant the same relief to Adam VIII and Levy.

Issues Presented for Review

1. Did the district court err in holding that plaintiff Big Seven failed to prove that on October 8, 1974 it entered into a valid oral agreement with defendants Lennon and Apple pursuant to which Big Seven's assignee, Adam VIII, obtained the right to manufacture, advertise and sell, by television promoted mail order sales in the United States only, an album of 15 to 16 rock and roll songs performed and recorded by Lennon?

2. Did the district court err in holding that Adam VIII's short-lived television promotion of Lennon's rock and roll album which sold only 1,270 copies and generated gross revenues to Adam VIII (before expenses) of less than \$7,000, necessarily, immediately and directly caused defendants to lose profits and royalties of \$389,800?

3. Did the district court err in failing to apply the rules of mitigation of damages to the defendants' counterclaims?

4. Did the district court err in assessing punitive damages of \$30,000 against Adam VIII and Levy under New York law when there was no evidence that the conduct of Adam VIII and Levy in relying on what even the trial court found to be at least a "tentative agreement",

amounted to gross fraud aimed at the public generally and involving high moral culpability tantamount to criminality, which are the tests for punitive damages under New York law.

Statement of the Case

To avoid duplication and repetition, Levy respectfully incorporates by reference the entire Statement of the Case and Statement of the Facts contained in the separate brief of Big Seven and Adam VIII and submits an Additional Statement of Facts limited to the evidence relating to defendants' counterclaims.

Levy's Additional Statement of the Facts

The release and sale of Adam VIII's "Roots"

Adam VIII released its Lennon album, entitled "Roots", on February 7, 1975 (Levy, A. 342). Television commercials appeared in a limited number of markets during the period from February 8 to 16, 1975 (DX AR at E 290-291). "Roots" was offered to the public strictly on a mail order basis at a fixed price of \$4.98 per record (and \$5.98 per tape) (A. 1698, 1705, 1862).

On February 10, 1975, three days after the release of "Roots", Levy and Adam VIII received telegrams from Capitol and Lennon claiming that "Roots" was unauthorized (A. 35a, 37a, 38a).

At the same time, Capitol and Lennon induced Adam VIII's suppliers and television stations into refusing to handle "Roots", as more fully described in the Statement of the Facts in the brief of Big Seven and Adam VIII.

As a result, "Roots" managed to sell a total of 1,270 albums resulting in gross revenues of less than \$7,000, which did not even begin to cover Adam VIII's out-of-pocket pressing, printing and advertising costs (Schedule A, Responses of Plaintiffs and Levy to Apple's First Set of Interrogatories).

The release and sale of Capitol's "Rock 'n' Roll"

On January 28, 1975, Capitol persuaded Lennon not to put out the album as a television package through Levy but to let Capitol release this made-for-television album through regular retail channels (Lennon, A. 1002, 1916-1917).

Also on January 28, 1975, Lennon and Seider met with Capitol executives, and Lennon reviewed and approved final plans for the entire advertising, promotion and merchandising of the Capitol retail album which was given the title "Rock 'n' Roll" (Defendants' Amended Joint Statement of Undisputed Facts, PX 102, ¶ 94 at E 133-134).

On January 30, 1975, Seider informed Levy that Lennon would not put the album out as a television package through Levy and Levy thereupon informed Seider that he would release the Lennon album (Levy, A. 324-325). As already indicated, Adam VIII released "Roots" on February 7, 1975.

Seider threatened Levy with an injunction (Seider, A. 1272) and the evidence showed that defendants seriously considered seeking an injunction but concluded that they "didn't stand a terribly good chance of obtaining a TRO followed by an injunction" (Menon, A. 2548; Seider, A. 2123-2124) and decided to use their economic power instead to coerce Adam VIII's suppliers and television stations into refusing to handle Adam VIII's album, as described more fully in the separate brief of Big Seven and Adam VIII.

In the meantime, Lennon completed his final editing of the Capitol album on February 4 and 5, 1975 (PX 102, ¶ 117 at E 138-139) and Capitol proceeded to press the album and to print its jackets. Capitol's album was released on February 13, 1975 (A. 2469).

The sales of the Capitol album

Capitol sells its album to its so-called "customers", i.e., dealers, distributors and retailers, who, in turn, sell the albums to the ultimate consumers (A. 2668-2669, 2685).

The customers have the right to return unsold albums to Capitol (A. 2749).

Defendants' evidence showed that "Rock 'n' Roll" had net sales in the United States (i.e., after returns) of 342,000 albums (PX 110 at E 153).

The evidence at the trial also showed that after Lennon ceased to perform as a member of the Beatles group in 1968, the sales of his own albums followed no discernible pattern, except that albums containing compositions composed *and* performed by him and characteristic of his style did substantially better than albums which contained Lennon's performances but not his own compositions or which contained Lennon compositions that were out of step with his characteristic music. Lennon's albums up to and including "Rock 'n' Roll" had the following sales to consumers:

<i>Date of Release</i>	<i>Album Title</i>	<i>Net Sales (after returns)</i>
2/69	"Two Virgins"	25,000
5/69	"Unfinished Music No. 2: Life With the Lions"	51,500
10/69	"Wedding Album"	22,500
12/69	"Live Peace in Toronto 1969"	389,000
12/70	"John Lennon With Plastic Ono Band"	702,000
6/72	"Imagine"	1,553,000
9/71	"Sometime in New York City"	164,000
10/73	"Mind Games"	376,000
9/74	"Walls and Bridges"	425,000
2/75	"Rock 'n' Roll"	342,000

"Imagine", which was Lennon's one super-hit, consisted of Lennon's own typical compositions (A. 3017). "John Lennon with Plastic Ono Band", "Mind Games" and "Walls and Bridges" also consisted of Lennon's own typical compositions (A. 2648, 3003, 3007-3008).

"Sometime in New York City", on the other hand, contained Lennon's re-recording of certain old rock and roll

songs plus certain Lennon compositions plus an additional bonus record (at no extra charge to the consumer) of what Lennon characterized as "avant garde" material (A. 3006).

Similarly, "Live Peace in Toronto" was half straight rock and roll songs (some composed by Lennon) and half "avant garde" (A. 3178-3179).

Lennon himself admitted that the "Rock 'n' Roll" album which did not contain a single Lennon composition, was not a "characteristic" Lennon album (A. 3181-3182).

According to Capitol's Zimmerman, "Mind Games", which he agreed was a "100 percent true Lennon album" (A. 2648) and which sold 376,000 units, did "respectably well" (A. 2720).

Defendants nevertheless claimed that, but for the interference of Adam VIII's "Roots", Capitol would have sold many hundreds of thousands of additional copies of Lennon's "Rock 'n' Roll". Defendants attributed their alleged lost sales to two factors:

1. confusion in the marketplace, and
2. the fact that Capitol was forced to "rush" out its album in order to compete against "Roots".

Defendants' evidence of confusion

The only witnesses called by defendants to support their counterclaims were:

Bhaskar Menon, the President of Capitol,
Don Zimmerman, Executive Vice President of Capitol,
Harold Posner, Director of Financial Planning and Analysis of Capitol,

John Lennon,

Charles Petty, an advertising executive, and

David Marsh, a "Rolling Stone" reporter.

Defendants called no dealers, distributors, retailers or consumers and presented no polls or surveys to prove confusion in the marketplace.

Defendants relied entirely on hearsay testimony by Capitol executives and Lennon (accepted by the trial court over plaintiffs' and Levy's objections) that they had heard

from unnamed persons that some unnamed customers and consumers had been confused between "Roots" and "Rock 'n' Roll" (Zimmerman, A. 2590-2592; Lennon, 3145-3148).

Defendants' only other effort to prove confusion consisted of schedules (DX CU and CV at E 390 and 395) which Petty, an advertising executive, interpreted to show that the few days of television commercials for the "Roots" album *might* have been seen by as many as 800,000 viewers (A. 2618). He conceded, however, that his estimate could be overstated by as much as 1100 percent (A. 2612), and that he "couldn't even take a guess" as to how many people actually saw the commercial (A. 2617).

Defendants made no attempt to present evidence that even a single one of these viewers became so confused by the "Roots" commercial that he decided not to buy Capitol's "Rock 'n' Roll" album. Indeed, Zimmerman, Capitol's senior vice president for marketing, who testified that the "Roots" album caused "a tremendous amount of confusion" (A. 2590), conceded that he had never spoken to any customer or consumer who watched the "Roots" commercial (A. 2839).

The alleged "rush" of Capitol's album

Since defendants were unable to offer any proof of actual customer or consumer confusion, they shifted their emphasis at trial to an argument that the release of "Roots" forced Capitol to rush out "Rock 'n' Roll" earlier than planned and that this "rush" resulted in lost sales.

According to defendants' testimony at the trial, Capitol's president, Bhaskar Menon, made the decision to "rush" the Capitol album on February 7 or 8, 1975 (A. 2550) which was after Lennon had already finished all of his editing work on February 4 and 5, 1975 (PX 102, ¶ 117 at E 138-139).

However, in a deposition taken in May 1975, three months after his alleged critical "rush" decision, Menon testified:

"I cannot recall that we may have, that we expedited it (the Capitol album) to any unusual degree. We

probably did, but I am not—there is nothing clear in my mind about that having been a dominant factor.” (Menon deposition, p. 177, read in at A. 2473).

The question of whether there was indeed a “rush”, which we deny, is discussed more fully in the argument portion of this brief.

However, assuming that there was such a “rush”, what were its consequences?

Defendants admitted:

1. That the quality of Lennon’s recording was satisfactory (A. 2629).
2. That the quality of the Capitol jacket was satisfactory (A. 2644).
3. That the “rush” caused no production problems at Capitol (A. 2736).

They also admitted that all marketing and promotion plans had been completed on January 28, 1975, well before the alleged “rush” decision on February 7 or 8, 1975 (PX 102 at E 134; A. 2550), that no changes were made in these marketing and promotion plans after the “rush” decision (A. 2628) and that all components of the plan were included (A. 2632).

Defendants admitted that radio advertising was adequate (A. 2777) and the evidence showed that Capitol’s magazine advertising appeared in the February 22, 1975 issues of three leading trade magazines, “Billboard”, “Cash Box” and “Record World”, which went on sale February 17, 1975, four days after the release of the Capitol album (DX CX at E 397).

Defendants did argue that as a result of the “rush” they were forced to curtail their television advertising. However, the only evidence they presented was the testimony of Don Zimmerman, Capitol’s marketing vice president, that in the fall of 1974 (when it was not even certain that Lennon would bother to complete the long-delayed Spector “oldies” album) Zimmerman had given some thought to a massive television advertising campaign and had discussed

it with some unnamed persons (A. 2773-2776). Defendants offered no written evidence of such a planned campaign.*

After many hours of this type of testimony, Judge Griesa exclaimed:

"... to be told that the TV campaign wasn't as big as it would have been, and the witness doesn't know what it would have been and what it was, that is extremely vague and we go on and on with this kind of vague stuff.

. . .

"I think I could go back through the record, and I could point to all kinds of generalities that this was not a happy situation, but unfortunately, and goodness knows I'm not eager to spend a lot of time on this case, more than I already have, but if somebody is trying to collect a lot of money for so-called loss of sales, or whatever, I'm going to have to have some specifics." (A. 2658-2660.)

Under Judge Griesa's repeated prodding to come up with some concrete evidence that the alleged "rush" had resulted in any loss of sales (A. 2660-2667), defendants finally offered DX CX (E 397), an exhibit prepared during the trial solely for purposes of the trial, which purported to show that there was a 3-day delay in shipping out posters and a two-week delay in shipping out T-shirts, buttons, postcards and stickers and that a planned mobile was scrapped for unexplained reasons. However, defendants offered no evidence whatsoever that these brief delays caused even the slightest reduction in the sales of Capitol's "Rock 'n' Roll" album.

The initial success of the "Rock 'n' Roll" album

Capitol's president, Bhaskar Menon, testified in response to a question by his own counsel that the "chief principal

* There is a distinction between a "television album" of the type promoted by Adam VIII (where the television campaign is the sole promotion method) and television advertising of an album sold through regular retail channels, which is simply another form of advertising.

impact of an album on the market in terms of time . . . its largest selling period" is "immediately upon release" (Menon, A. 2553).

Thus, if the short-lived "Roots" commercials had any adverse impact on the sales of "Rock 'n' Roll", it should have been during the weeks immediately following its release on February 13, 1975 when the recollection of the "Roots" commercials, which stopped running on February 16, 1975, might still have been fresh in the minds of television viewers.

However, the proof at trial showed precisely the opposite effect. Plaintiffs subpoenaed the sales figures for Capitol's "Rock 'n' Roll" album which showed that Capitol's sales to its own customers, i.e., dealers, distributors and retailers, were unusually heavy during the first three months (PY 233 at E 179).

Defendants sought to explain away these favorable sales figures by arguing that they did not reflect sales to consumers and radio air play (Zimmerman, A. 2821, 2837).

After repeated questioning by the trial judge, defendants admitted that they had no proof of how sales to consumers were affected one way or another (Zimmerman, A. 2821, 2837).

Plaintiffs, on the other hand, introduced the weekly hit charts compiled from national retail stores by the three leading trade magazines, "Billboard" (PX 231 at E 176), "Cash Box" (PX 250 B at E 186) and "Record World" (PX 250C at E 187).^{*} Lennon's expert, David Marsh, admitted that the trade magazine charts are important guides of consumer sales and radio air play (A. 3311, 3312).

The charts showed that during the first few weeks—the very period when, according to defendants' theory, sales to consumers should have been adversely affected by the promotion of Adam VIII's "Roots", the Capital album did phenomenally well among consumers. It made it into the

* Billboard states on the face of its chart that it is:

"Compiled from National Retail Stores by the Music Popularity Chart Department and the Record Market Research Department of Billboard" (E. 176)

top 20* hits less than a month after its release and worked its way up to No. 6 by the middle of April 1975. (PX 250D at E 188)

Sales of the Capitol album began to fall off only several months after its release. While there was no evidence whatsoever that this gradual decline was in any way attributable to the "Roots" commercials, which had been forced off the air on February 16, 1975, there was massive evidence that the decline was due to one or more of the following factors:

1. The Capitol "Rock 'n' Roll" album received devastatingly bad reviews in the most important pop music publications, "Rolling Stone Magazine" (PX 201 at E 155), the "Village Voice" (PX 200 at E 154) and "High Fidelity Magazine" (PX 253 at E 191).** These unfavorable critical reviews were the very thing that Lennon had feared when he stated to Levy at the October 8, 1974 Cavallero meeting that he was afraid the critics were lying in wait for his album and that he would like to bypass the critics by putting out the album as a television package (Lennon, A. 710). Lennon was right. The critics were lying in wait for his long-delayed album and they panned it.

2. The "Rock 'n' Roll" album was not a "characteristic" Lennon album in that it did not contain any of Lennon's own typical compositions (Lennon, A. 3181-3182). Indeed, Lennon admitted that in releasing an album of compositions that he did not write he was "taking a risk" and that there was no way of knowing if it would be his biggest or lowest seller (A. 3190-3191). It is therefore likely that, after the initial success of Capitol's "Rock 'n' Roll" album, the word got around among consumers that this was not a typical Lennon album and sales thereupon fell off.

* Zimmerman, Capitol's senior vice president for marketing, conceded that a record that makes the "top 20" is selling well (A. 2723).

** Excerpts from these reviews are quoted at page 34 of this brief.

3. Defendants' witnesses admitted that during the period when "Rock 'n' Roll" was on sale, there was an economic recession, youngsters (who make up the majority of popular music fans) were unemployed (A. 2536) and Capitol's record sales generally were down by 25% according to Capitol's Zimmerman (A. 2707) and by 14% according to Capitol's Posner (A. 3021-3022).

In view of these highly adverse factors, "Rock 'n' Roll" actually did remarkably well in comparison with the two preceding albums, which were characteristic Lennon albums consisting exclusively of Lennon songs and which were not panned by the critics:

<i>Release Date</i>	<i>Title</i>	<i>Net Sales (after returns)</i>
10/73	"Mind Games"	376,000
9/74	"Walls and Bridges"	425,000
2/75	"Rock 'n' Roll"	342,000
		(PX 110 at E 153)

If one averages "Mind Games" and "Walls and Bridges", the result is 400,500. The 58,500 difference between 400,500 and 342,000 represents a drop of 14.6% which can be accounted for by the admitted 14 to 25% drop in Capitol's overall sales during that period (A. 2707-3021-3022), to say nothing of the adverse impact of the unfavorable critical reviews and the fact that "Rock 'n' Roll" was not a "characteristic" Lennon album.

Judge Griesa nevertheless concluded that "Rock 'n' Roll" should have sold 442,000 instead of 342,000 albums and assessed compensatory damages of \$194,068 against Levy and Adam VIII for Capitol's lost sales and EMI's and Lennon's lost income, of which he awarded \$59,568 to Lennon.*

In making this determination, the trial judge relied on evidence of Canadian sales (A. 3469) which, as we show at

* In his April 8, 1976 decision, the trial judge awarded on account of the lost sales, compensatory damages of \$200,500 to defendants, of which \$66,000 was granted to Lennon. As previously noted on page 2, *supra*, pursuant to stipulation Lennon's damages were subsequently reduced by \$9,400, of which \$6,432 are attributable to the lost sale claim.

pages 36-38 of this brief, was improperly received and which the trial judge had informed counsel during the trial that he gave little weight (A. 3109).

Capitol's price reduction

Defendants also claimed that they were forced to reduce the suggested retail price of "Rock 'n' Roll" from \$6.98 to \$5.98 in order to compete against the "Roots" album which was offered to mail order customers at a fixed price of \$4.98 (plus postage and handling of \$.75 to \$.90 in the case of C.O.D. orders [Levy, A. 1704-1705]).*

However, Capitol's witness, Zimmerman, admitted at the trial that the suggested retail prices of \$6.98 and \$5.98 were, in over 90% of all record sales, not the prices charged to consumers (A. 2679), and that the true prices to wholesalers and consumers were as follows:

Suggested retail price	\$6.98	\$5.98
	<hr/>	<hr/>
Wholesale price	\$3.36	\$2.90
Actual retail price to consumers	\$3.66-\$4.79	\$3.50 and up
(Zimmerman, A. 2579, 2678-2679, 2682, 2702.)		

Thus, if Capitol had not reduced the suggested \$6.98 retail price at all, its album would have sold to consumers in a range of \$3.66 to a maximum of \$4.79, which was well below the fixed mail order price of \$4.98 for the Adam VIII album. As we show in our argument at p. 38 below, Capitol's witnesses were unable to explain why an actual retail price of \$3.66-\$4.79 had to be reduced still further in order to compete against an actual retail price of \$4.98.

Judge Griesa nevertheless concluded that Capitol's decision to reduce its price was entirely attributable to the wrongdoing of Adam VIII and Levy, and assessed compensatory damages of \$160,732 against Adam VIII and Levy

* The corresponding suggested retail prices for Capitol's tapes were \$7.98 and \$6.98 versus Adam VIII's actual retail price of \$5.98 for tapes. For purposes of analysis, we will refer in this brief only to prices for records but the same price relationship is true of tapes (A. 2922-2923).

for the profits and royalties defendants would have earned had the suggested list price of "Rock 'n' Roll" not been reduced, of which he awarded \$40,732 to Lennon.*

Whatever the reasons may have been for Capitol's price reduction (and Capitol's president, Menon testified in his deposition (A. 2383) that the reduction was made because of (i) the recession, (ii) the fact that this was not a typical Lennon album and only (iii) in order to compete against the \$4.98 "Roots") there was no evidence that this reduction was a *necessary* consequence of the release and promotion of "Roots". At most, it represented a business judgment by Capitol that its album, which was already priced at \$.19 to \$1.32 less than the Adam VIII album, should be made available to consumers at an even lower actual retail price.

As we show below, a party is not entitled to recover damages for injuries which were not the necessary consequence of the wrongdoing or which resulted from what turned out to be an improvident exercise of business judgment. Moreover, the evidence showed that defendants failed to mitigate their damages. Capitol could easily have raised its price again once "Roots" was forced off the air on February 16, 1975, three days after the release of Capitol's album, but failed to do so (See pages 50-51 below).

Lennon's claim of injury to reputation

The district court awarded Lennon additional compensatory damages of \$35,000 for injury to reputation and the unauthorized use of his name and likeness.

While Lennon offered evidence that the quality of the "Roots" album was inferior to the Capitol album (A. 972-973, 989-992, 3145, 3160-3161) and while he expressed his own displeasure with the cover of "Roots" (which con-

* In his April 8, 1976 decision, the trial judge awarded, on account of the price reduction, compensatory damages of \$163,700 to defendants, of which \$43,700 was granted to Lennon. As previously noted on page 2, *supra*, pursuant to stipulation Lennon's damages were subsequently reduced by \$9,400, of which \$2,968 is attributable to the price reduction claim.

tained a perfect photographic likeness of Lennon's face—compare the cover [PX 34] with contemporaneous magazine photographs of Lennon [PX 92, 93*], Lennon presented no evidence whatsoever that his reputation as an artist was diminished one whit by reason of the release and brief promotion of "Roots". Even Lennon's counsel admitted during summation that he really had no way of suggesting how to assess appropriate compensatory damages (A. 3404). Adam VIII and Levy, on the other hand, presented evidence, discussed in Point V, *infra*, that Lennon's reputation had been substantially compromised by his own actions.

I

The Trial Court erred in holding that there was no enforceable oral agreement for the completion and television marketing of Lennon's Rock and Roll album.

In the first phase of the case, the trial court held that plaintiffs had failed to prove that on October 8, 1974 Big Seven had entered into a valid oral contract with Lennon and Apple for the completion by Lennon of an album of rock and roll songs which would be marketed on television by Adam VIII.

We respectfully submit that the trial court erred on the law and on the facts and that Big Seven and Adam VIII obtained the right to manufacture, promote and sell the "Roots" album. Accordingly, Adam VIII and Levy did not violate any of defendants' property rights when Adam VIII released the "Roots" album.

Big Seven and Adam VIII are submitting a separate brief on this phase of the case and, in order to avoid duplication, Levy will refrain from arguing this point here and respectfully joins in all aspects of their brief.

* Lennon admitted at the trial that PX 92 and PX 93 were fair representations of the way he looked in late 1974 and early 1975 (A. 1945-1946).

II

Defendants had the burden of proving that the release and promotion of "Roots" was the necessary, immediate and direct cause of defendants' alleged losses.

While it is the general rule that a wrongdoer should not be allowed to escape liability where his wrongdoing has made it difficult to prove the *amount* of damages with mathematical certainty, this does not relieve one who seeks damages from the necessity of proving with a requisite degree of certainty:

- (a) that he *was* damaged, and
- (b) that there is a necessary, immediate and direct causal connection between the wrongdoing and the damages.

In the leading case of *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931), the Supreme Court explained this critical distinction in the following terms:

"The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

The Supreme Court made it clear in *Story Parchment* that one who seeks damages from a tortfeasor still has the burden of proving that the damages resulted:

"necessarily and immediately and directl'y from the breach . . ." (282 U.S. at 563.)

This rule also applies to unfair competition cases. See *American Safety Table Co. v. Schreiber*, 415 F.2d 373, 381 (2nd Cir. 1969); *Ronson Art Metal Works, Inc. v. Gibson Lighter Manufacturing Co.*, 3 A.D. 2d 227 (1st Dept. 1957).

In short, even if this Court were to hold that the trial judge was correct in deciding that Adam VIII and Levy

committed a tort by virtue of an unauthorized release and promotion of "Roots", defendants still had the burden of proving that such tort was the necessary, immediate and direct cause of defendants' alleged losses before the trial court could even reach the question of how to compute these losses.

We respectfully submit for the reasons set forth below, that defendants failed to prove a necessary, immediate and direct causal connection between the issuance and promotion of "Roots" and their alleged damages and that they also failed to prove any damages.

To avoid duplication, we respectfully refer the Court to pages 32 and 33 of the separate brief of Big Seven and Adam VIII which discuss the applicability of the "clearly erroneous" rule. We submit that this rule is particularly inapplicable to the statistics and documentary exhibits relied on by the trial judge, which this Court can read and evaluate for itself. *San Filippo v. United Brotherhood of Carpenters and Joiners of America*, 525 F.2d 508 (2nd Cir. 1975), *Fur Information and Fashions Council Inc. v. E. F. Timme & Son, Inc.*, 501 F.2d 1048 (2nd Cir. 1974), and *United States ex rel. Lasky v. LaVallee*, 472 F.2d 960 (2nd Cir. 1973).

III

Defendants failed to prove that they lost any sales because of "Roots".

Defendants Capitol and EMI advanced two theories to support their claim that they lost sales as a result of "Roots":

Theory No. 1: That the release and promotion of "Roots" caused customer and consumer confusion.

Theory No. 2: That the release and promotion of "Roots" forced Capitol to rush out its own album without adequate preparation and promotion.

Lennon's counsel, on the other hand, advised Judge Griesa that the only monetary relief Lennon sought on his "property" counterclaims against Adam VIII and Levy

was an accounting of Adam VIII's profits (A. 2344a5).^{*} The trial judge nevertheless awarded Lennon damages of \$100,300 for royalties which Lennon allegedly would have received from Capitol but for Adam VIII's and Levy's tortious conduct. We submit that the trial judge erred in awarding Lennon damages which he did not even demand and that the monetary judgment in favor of Lennon should be reversed on that ground alone. Assuming, *arguendo*, that an award of damages to Lennon was appropriate and that Lennon now is entitled to rely on the damage theories and evidence advanced by Capitol and EMI, then we submit that the judgment is nevertheless erroneous for the following reasons:

1. Defendants failed to offer proof of any customer or consumer confusion

With respect to Theory No. 1, defendants offered no evidence to show that the sale of 1,270 "Roots" albums or the few days of TV commercials in limited markets

^{*} Lennon asserted two counterclaims in his pleadings: violation of his rights under Sections 50 and 51 of the New York Civil Rights Law and misappropriation of his common law rights to his performances, reputation and good will. He sought damages and an injunction on his Civil Rights claims and an accounting and an injunction on his misappropriation claims (A. 171a). At a hearing on February 27, 1976, Lennon amended his pleadings to allege a breach of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (A. 2344a22). The district court referred, at that hearing, to the various misappropriation theories asserted by the various defendants as "property claims", and, upon questioning by the trial court, Lennon's counsel specifically stated that the only relief Lennon sought on the "property claims" was an accounting:

"The Court: On the property claims are you seeking any damages?

Mr. Bergen: Yes, your Honor. The misappropriation of his performances without his permission and an accounting as to what profits—

The Court: On the property claims you are seeking the profits?

Mr. Bergen: That is correct, your Honor.

The Court: Period.

(footnote continued on following page)

caused any confusion among customers or consumers, let alone confusion which, in turn, damaged Capitol's sales.*

Defendants did not put any customers or consumers on the stand nor did they offer any polls or surveys which are customary methods of proof in unfair competition cases. See Judge Feinberg's extensive discussion of such surveys in *Zippo Manufacturing Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 680-686 (S.D.N.Y. 1963).

Instead defendants relied exclusively on conclusory hearsay statements by Capitol's executives, Lennon and a reporter that they had heard from unnamed sources that unnamed people in the field had expressed some confusion.

Over plaintiffs' and Levy's repeated objections (A. 2591), the trial judge allowed Zimmerman to testify, without giving any names or other details, that the release of "Roots" caused "a tremendous amount of confusion" (A. 2590); that Capitol's promotional efforts "were substantially set back mainly because of the uncertainty from our customers and our own people in the field" (A. 2591); and that Capitol's customers "were worried about their own image as a retailer or as a merchandiser of records." (A. 2591.)

Over plaintiffs' and Levy's objection, the trial court allowed Capital's counsel to ask Zimmerman:

"Was the concern expressed about the possibility that the 'Roots' album might subsequently appear in retail distribution channels and compete directly with some of your customers?" (A. 2592.)

and allowed Zimmerman's hearsay response. (A. 2592.)

Over plaintiffs' and Levy's objection that the question was designed to elicit hearsay (A. 3275), the trial court

(footnote continued from preceding page)

Mr. Bergen: I think that is all we are entitled to.

The Court: I think that is all you have asked for. Okay."

(Emphasis supplied) (A. 2344a35)

* 1,270 is less than 4/10ths of 1% of the 342,000 "Rock 'n' Roll" albums that were sold.

allowed Lennon's counsel to ask David Marsh, a "Rolling Stone" reviewer:

"Did you hear generally in the industry that there was confusion as to the 'Roots' album?" (A. 3274)

and allowed Marsh's hearsay response. (A. 3274-3275.)

Over plaintiffs' and Levy's objection that Lennon was not qualified to express an opinion as to whether the public was confused (A. 3145-3146), the trial court allowed Lennon to state of "Roots":

"It confused the public's mind . . ." (A. 3145)

Over plaintiffs' and Levy's objection that Lennon's testimony was all hearsay (A. 3147), the trial court permitted Lennon to state:

"They were confused by it, and the industry was confused . . .

. . . .

I honestly remember one taxi driver talking to me after I had been on a radio program. Some members of the public rang up the radio station and they were confused on it . . ." (A. 3146-3147.)

Not only was all of the foregoing testimony pure hearsay which should not have been admitted in the first place; it was also totally devoid of names, places, times and other particulars and, even if admissible, was entitled to no probative weight.

Although defendants argued below that they were not required to prove that there was *actual confusion* and that it was sufficient for them to show a *likelihood of confusion*, the cases relied upon by defendants were injunction cases—not damages cases.* And while a court

* The "confusion" cases defendants cited all involved violations of Sections 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), where the injuries flowed from confusion caused by "false description" of the goods or of their origin. Since the trial court found that the "Roots" commercial did not make any representations that

(footnote continued on following page)

may enjoin future acts of unfair competition upon a showing that there is a reasonable likelihood of confusion, it may not award money damages except upon proof of actual confusion. See, e.g., *Hesmer Foods, Inc. v. Campbell Soup Co.*, 346 F.2d 356, 359 (7th Cir. 1965) ("To establish a right to damages, actual deception must be shown. To obtain equitable relief, only a likelihood of consumer deception need be shown."); *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641 (3rd Cir. 1958); *Geisel v. Poynter Products, Inc.*, 295 F. Supp. 331 (S.D.N.Y. 1968).

We therefore respectfully submit that defendants' proof of confusion was utterly inadequate to support an award of damages.*

2. Defendants failed to prove that the alleged "rush" in releasing their album caused any lost sales

Although until the very eve of the trial of defendants' counterclaims, defendants' principal claim for damages was based on the "confusion" allegedly caused by the

(footnote continued from preceding page)

"Roots" was authorized by EMI, Capitol, Apple or Lennon (A. 2842), and since the commercial accurately stated that the album being offered to the public contained performances by Lennon of rock and roll music, defendants were forced to argue that the album jacket and the label on the record and tape contained the false statement that the album was produced with the permission of Lennon and Apple (A. 2344a10-2344a11.)

Since the statement on the album could only be known to the consumer after he purchased "Roots", and only 1,270 copies were sold, it is obvious that any loss of sales which Capitol suffered was not the necessary, immediate and direct consequence of Adam VIII's highly technical violation of the Lanham Act.

* Defendants also failed to establish that they are entitled to an injunction at this time. The proof shows that the pressing, release and promotion of "Roots" were effectively halted in February 1975. While a few late mail orders may still have been fulfilled thereafter, there was no evidence that sales were continuing, and defendants failed to prove that there was any need or justification for the drastic remedy of an injunction.

"Roots" TV campaign,* Judge Griesa's finding that "Roots" interfered with "Rock 'n' Roll" sales was primarily based on Capitol's alleged "rush" to release "Rock 'n' Roll" so it could compete with "Roots" in the marketplace. (A. 2386-2387.) As we show below, however, defendants failed to prove either that there *was* a "rush", or that the "rush" was the necessary, immediate and direct cause of defendants' alleged loss of sales.

(a) There was no "rush" at all

When Menon gave his deposition in May, 1975, he testified:

"I cannot recall that we may have, that we expedited it (the Capitol album) to any unusual degree. We probably did, but I am not—there is nothing clear in my mind about that having been a dominant factor." (Menon deposition, p. 177, read in at A. 2473.)

Yet by the time of the trial, the alleged February 1975 "rush", which Menon could not remember when he testified in May 1975, had become a dominant theme of defendants' case, presumably because defendants realized that they had no proof of customer or consumer confusion.

(b) The alleged "rush" did not hurt the quality of the album or the jacket

Defendants conceded that the alleged "rush" did not hurt the quality of Lennon's final editing, which took place on February 4 and 5, 1975 (PX 102, ¶ 117 at E 138-139), before Menon made his alleged decision on February 7 or 8, 1975 to "rush" the album (A. 2550).

* As late as March 30, 1976, Capitol filed a brief entitled "Memorandum in Support of Full Recovery Upon Counterclaims" in which it stated, at page 2:

"... Levy had commenced an advertising campaign which was the source of *most* of the damage ultimately sustained by the defendants in connection with the sales of their competing Lennon album." (Emphasis supplied.)

Defendants also conceded that the quality of their album jacket was satisfactory (Menon, A. 2476) and that the "rush" caused no album production problems (A. 2736).

So the only question is whether the alleged "rush" hurt defendants' promotion plans and, if so, whether the damage to their promotion plans actually resulted in any lost sales.

(c) There was no proof that the alleged "rush" damaged Capitol's promotion and marketing plans

Defendants' Amended Statement of Undisputed Facts (PX 102) stated in paragraph 94 at E 133:

"On the same date, January 28,* Coury, Seider, Pang and Lennon had dinner at Gallagher's Steak House in New York City to discuss the layout, cover, artwork, advertising, promotion, merchandising, etc. of the 'Rock 'n' Roll' album (as the 'oldies' album released by Capitol and EMI was subsequently entitled).

The group then went to the Capitol Suite at the Sherry Netherland Hotel, where they were joined by Roy Kohara, the head of Capitol's art department, and Dennis Killeen, the head of Capitol's merchandising department. *Final plans were presented to and approved by Lennon for the entire advertising, promotion, and merchandising of the 'Rock 'n' Roll' album.*

Killeen ran down a *complete marketing campaign* in the others' presence and *Lennon approved it* with some minor corrections." (Emphasis supplied.)

Zimmerman admitted that, even after Menon's alleged "rush" decision on February 7 or 8, 1975, no changes were made in the marketing plans or the promotion plans from

* January 28, 1975 was the date on which Capitol (at Seider's urging) persuaded Lennon not to put out a television package with Levy but to allow Capitol to release the album on a regular retail basis (Lennon, A. 1002).

the ones approved by Lennon on January 23, 1975 (A. 2628) and that all components of the plan were included (A. 2632).

Defendants' Exhibit CX (E 397) shows that Capitol's advertising appeared in the February 22 1975 issue of "Billboard", "Cashbox" and "Record World", which went on sale February 17, 1975.

Zimmerman admitted that radio advertising was adequate (A. 2777).

With respect to Capitol's alleged reduction of television advertising, there was no proof that Capitol would really have spent more on television but for "Roots". Capitol claimed that it planned a massive TV campaign as far back as the fall of 1974 (when it was not even certain that Lennon would bother to complete the long-delayed "oldies" album). If there was indeed such a plan, one would think there would at least be a contemporaneous memo or two on the subject. But all the defendants offered on this point was Zimmerman's very vague, self-serving testimony that this is something he had in mind and had discussed with unnamed people (A. 2773-2776). Indeed, the trial judge pointedly noted:

" . . . to be told that the TV campaign wasn't as big as it would have been, and the witness doesn't know what it would have been and what it was, that is extremely vague and we go on and on with this kind of vague stuff." (A. 2659)

Moreover, Capitol failed to offer a convincing explanation of why it was impossible or impractical to increase television advertising or other promotions as soon as "Roots" went off the air on February 16, 1975 (three days after the release of "Rock 'n' Roll").*

* Zimmerman contended that Capitol reduced its suggested list price for "Rock 'n' Roll" because of fear of competition from "Roots" and that made it impossible to finance a TV campaign (A. 2783). However, as we show in Point IV, *infra*, defendants failed to prove that "Roots" was the necessary and direct cause of

(footnote continued on following page)

Consequently, all that is left of Capitol's proof is that Capitol cancelled its plan to have mobiles and there were brief delays in shipping out posters, T-shirts, buttons, postcards and stickers and perhaps some reduced orders for these items. And even if the Court were to hold that "Roots" was the necessary, immediate and direct cause of this cancellation and delay, defendants failed to offer any proof that the cancellation and delay resulted in any lost sales.

Defendants' only proof relating to the mobiles was the following testimony of Zimmerman:

"... you will notice there was no mobile here. We scrapped that because it would take a month to produce. They need to be die-cut and specially boxed, and we just couldn't do it in time." (A. 2788.)

No attempt was made by the defendants to prove that the cancellation of the mobiles caused "Rock 'n' Roll" to suffer any loss of sales. Indeed, there was no evidence of what type of mobile was planned and how and where it would be used.

Defendants' Exhibit CX (E 397), which is not a contemporaneous document but something drawn up by defendants during the trial, shows that the posters arrived three days after the initial release of the Capitol album; the T-shirts and other paraphernalia arrived before the end of February (E 397). In the meantime, as we show below, the Capitol album was zooming its way up the charts (PX 250D at E 188) and Capitol's customers were order-

(footnote continued from preceding page)

the price reduction or that the suggested list price could not have been raised to its normal level after "Roots" was withdrawn from the market, just three days after the release of "Rock 'n' Roll". Similarly, there is no proof that after "Roots" went off the air on February 16, 1976, and after "Rock 'n' Roll" did extremely well on the Billboard, Cashbox and Record World charts for many weeks (PX 250D), it was not feasible to crank up an additional television campaign to sustain the initial, favorable momentum of "Rock 'n' Roll".

ing huge initial quantities of the album (PX 233 at E 179) despite the delays in delivering the T-shirts, etc.

Consequently, we submit that defendants utterly failed to prove that these minor delays caused any loss of sales whatsoever.

**(d) There was no proof that the alleged
"rush" hurt Capitol's sales**

Menon testified, in response to questions of Capitol's counsel, that it is the initial response to a record that is of greatest importance:

"Q. Mr. Menon, when is the chief principal impact of an album on the market in terms of time, from its moment of release, when is its largest selling period?

A. Immediately upon release.

Q. And, in other words, it has its greatest impact immediately and then the impact begins to decline?

A. No question." (A. 2553)

Plaintiffs and Levy then subpoenaed Capitol's sales figures for the first three months (PX 233 at E 179) to show that "Rock 'n' Roll" did very well during the initial sales period. Upon being confronted with these figures, Zimmerman tried to explain them away by testifying that they only showed sales to Capitol's "customers", i.e., distributors, rack jobbers and retailers (A. 2747) and that he had no way of knowing how sales to consumers were affected (A. 2821, 2837). Capitol's counsel also admitted that Capitol had no consumer sales figures (A. 2829).

Aside from the fact that defendants thereby admitted that Capitol really had no proof at all that the alleged "rush" hurt consumer sales during the critical early stage, such evidence as was offered by plaintiffs and Levy pointed the other way.

The hit charts, published by "Billboard" magazine (PX 231 and 250A), one of the leading trade publications, showed that "Rock 'n' Roll" did remarkably well in the early stages (A. 2723). It made it into the top 20 hits less

than a month after its release and worked its way up to No. 6 by the middle of April 1975.*

Although the Billboard charts state on their face that they are:

"Compiled from National Retail Stores . . ." (PX 231, E 176),

Zimmerman tried to belittle their importance by saying that they do not really reflect consumer sales (A. 2724).

However, Capitol's Posner inadvertently admitted (while trying to make a different point) that the charts are an important guide in the industry (A. 3039-40) as did Lennon (A. 3198).

In short, the evidence showed that "Rock 'n' Roll" did very well during the critical early period both among customers and consumers.

Indeed, it is quite likely that Capitol's sales were helped along by the Adam VIII commercials which listed the famous rock and roll oldies included in the Lennon album, showed pictures of Lennon and proclaimed "John Lennon singing the great rock and roll songs". When Lennon was asked whether the Adam VIII commercial had helped or hurt his Capitol record, he truthfully answered that he did not know (A. 3196).

And that is really the point. In the absence of a consumer survey, which could and should have been undertaken by defendants who had the burden of proof on damages,** there is simply no way of telling whether the short-lived "Roots" commercials hurt or helped Capitol's sales.

* The summaries of the "Cash Box" (PX 250B) and "Record World" (PX 250C) charts showed the same or better results (e.g. "Rock 'n' Roll" was number 4 on "Record World's" chart for the week of April 5, 1975 [E 187, 188]). Lennon's expert witness, David Marsh, confirmed that these 3 charts are important guides of consumer sales and/or radio air play. (Marsh, A. 3311, 3312.)

** Plaintiffs obviously did not have the burden of proving a negative, i.e., that their commercials had not hurt the sales of "Rock 'n' Roll".

(c) Defendants' "numbers" game

At one point during the trial, the Court asked the question:

"What are good sales? Does that word have any meaning? Is 300,000 good? 400,000?" (A. 2899.)

Zimmerman gave a partial answer when he testified that "Mind Games", an album of original Lennon compositions which sold 376,000 units, did "respectably well" (A. 2720).

Thus one question is whether "Rock 'n' Roll", which sold 342,000 units, was also within the "respectably well" range or whether it did so poorly, as a necessary, immediate and direct result of "Roots", that the trial court was justified in awarding heavy compensatory damages for lost sales.

Defendants made no attempt to offer any direct proof of lost sales attributable to "Roots". They presented no customers, consumers, polls or surveys. Instead, they relied on a purely statistical approach to show that "Rock 'n' Roll" should have sold more than 342,000 units.

Defendants offered ten different methods of projecting the sales "Rock 'n' Roll" would have had but for "Roots" (DX DC at E 402). The first three were averages of actual sales of certain prior Lennon albums. These averages were objectionable on a number of grounds:

(i) Defendants deliberately excluded
certain of Lennon's albums

Defendants' averages were not based on all of Lennon's individual albums since the Beatles broke up. They deliberately excluded:

<i>Release Date</i>	<i>Title of Album</i>	<i>Net Sales to consumers</i>
2/69	"Two Virgins"	25,000*
5/69	"Unfinished Music No. 2: Life With the Lions"	51,500
10/69	"Wedding Album"	22,500
12/69	"Live Peace in Toronto 1969"	389,000
Total		488,000
Average		122,000 (A. 2987)

Even if one were to exclude Lennon's "Two Virgins", which Capitol refused to release because of its vulgarity (A. 1951), the total is 463,000 and the average is 154,000.

Defendants argued that all of these earlier Lennon albums should be excluded from any averages because they were "avant garde" or not "characteristic Lennon" albums. (A. 2585, 2713-2716).)

However, as Lennon himself admitted, he assumes full responsibility for anything that goes out over the Lennon name with his consent—be the results good or bad (Lennon, A. 3180).

If one defines a "characteristic Lennon" album as one containing Lennon's own compositions ("John Lennon with Plastic Ono Band", "Imagine", "Mind Games", and "Walls and Bridges"), then it must be recognized that "Rock 'n' Roll" was clearly *not* a "characteristic Lennon" album (since it contained no Lennon compositions) and its sales should not be judged by the sales of "characteristic Lennon" albums.

Judge Griesa observed, after listening to the albums:

"The thing is I have heard Walls and Bridges and I

* Lennon's estimate, (A. 3170).

have heard Rock and Roll. There is a big difference."
(A. 2903.)

Lennon himself admitted that "Rock 'n' Roll":

"is a step out of character, really." (Lennon, A. 3181.)

Lennon added that while he is known as a rock and roll singer, the "Rock 'n' Roll" album and its songs were "uncharacteristic inasmuch as I didn't write them" (Lennon, A. 3182).

And, under questioning by Judge Griesa, Lennon candidly admitted that there was no way of telling whether "Rock 'n' Roll" should have sold well or badly:

"The Court: Now, I guess one of the things we are trying to get at, and I don't know how to find out is this: If your fans have grown to enjoy your characteristic music, and buy those records, then you come along and you record an album which is maybe very fine, but is different; how, isn't that going to affect the sales in some way?

The Witness: But, your Honor, it could go either way.

. . .

It could have been the biggest seller I ever had and it could have been the lowest seller. There is no way of knowing." (A. 3189-3190.)

**(ii) Defendants' averages proceed
from the wrong starting point**

Several witnesses testified that "Imagine" (which sold 1,553,000) was the high point of Lennon's solo career; he then came out with "Sometime in New York City" (sales of 164,000) which represented one of the low points.

For example, Capitol's Posner testified that after "Sometime in New York City":

"I don't want to use the words starting from scratch but we were rebuilding this artist again." (A. 2901.)

We submit that if averages are to be used at all in proving defendants' damages (and we do not think they should be), a fair average would be based on Lennon's sales following his superhit "Imagine". These figures would show:

6/72	"Sometime in New York City"	164,000
10/73	"Mind Games"	376,000
9/74	"Walls and Bridges"	425,000
		<hr/>
Total		965,000
Average		321,667
Compare Net Sales of "Rock 'n' Roll"		342,000
(PX 110 at E 153)		

Although defendants argued strenuously (A. 2585) that it is unfair to include "Sometime in New York City" because it was not "characteristic Lennon", their objection to its inclusion is wholly without merit, both because "Rock 'n' Roll", by Lennon's own admission, is also not "characteristic Lennon", and because "Sometime in New York City" *was in fact* basically "characteristic Lennon". It is a two record album containing one record with rock and roll music including Lennon's own compositions and an *additional* bonus record (at no extra charge) containing "avant garde" material (A. 3006).

Consequently, it is hard to understand why "Sometime in New York City" should be excluded. However, even if it is excluded, the result would be as follows:

10/73	"Mind Games"	376,000
9/74	"Walls and Bridges"	425,000
		<hr/>
Total		801,000
Average		400,500

(PX 110 at E 153)

The 58,500 difference between 400,500 and "Rock 'n' Roll's" sales of 342,000 represents a drop of 14.6%, which can be attributed to any or all of the following factors:

(A) The economic recession

Capitol's witnesses admitted that during the period when "Rock 'n' Roll" was on sale, there was a recession, youngsters, who are the principal customers for popular music, were unemployed (A. 2536), and Capitol's record sales declined 25% according to Zimmerman (A. 2707); sales declined 14% according to Posner (A. 3021, 3022). These percentages alone would account for the 14.6% drop in "Rock 'n' Roll's" sales.

(B) The fact that "Rock 'n' Roll" was not a characteristic Lennon album

As noted above, "Rock 'n' Roll" was admittedly not a characteristic Lennon album like "Mind Games" and "Walls and Bridges" (Lennon, A. 3181). It did not contain Lennon's own compositions and, based on the sales experience of Lennon's other uncharacteristic albums, this fact undoubtedly hurt its sales.*

Indeed, Lennon's own expert witness, David Marsh, the editor of "Rolling Stone Magazine", testified that "doing that rock and roll album was a risky thing for Lennon to do" (A. 3230).

(C) The unfavorable critical reviews

At the Cavallero meeting in October 1974 Lennon had expressed his reluctance to release the album through regular retail channels because he feared that the nostalgia craze was over (A. 1911) and that the album would get an adverse reaction from the critics (A. 710).** His fears proved to be amply justified.

* Zimmerman admitted that in the only comparable situation he could think of (i.e., major artists releasing old material which was not their own), such an album did not do as well as albums containing the artists' own compositions ("Moon Dog Matinee" by The Band [A. 2711]).

** Indeed, the reason Levy was able to persuade Lennon to complete the "oldies" album as a television package which would be

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"Rolling Stone Magazine", the leading and most respected rock and roll and popular music magazine in the country with a circulation of 450,000 and with reviews that are syndicated in over 100 papers in the United States and Europe (Marsh, A. 3220), gave Capitol's "Rock 'n' Roll" a very poor review entitled "Lennon Get's Lost in his Rock & Roll" (PX 201 at E 155).

Except for admiring the "beautiful package" (i.e., the cover), the "Rolling Stone" reviewer had nothing good to say about Lennon's performance:

"Underneath the pushing, shoving and straining, his album sounds like music in search of a climax that never comes."

"The most revealing failure . . ."

"John Lennon *was* [there], but sounds like he's forgotten what it was like. In making an album about his past, he has wound up sounding like a man without a past. If I didn't know better, I would have guessed that this was the work of just another talented rocker who's stumbled onto a mysterious body of great American music that he truly loves but doesn't really understand. There was a time when he did."

The Capitol album received similarly dismal reviews in "Village Voice" (PX 200 at E 154) and "High Fidelity Magazine" (PX 253 at E 191).

The "High Fidelity Magazine" review stated:

"His (Lennon's) run-through of fourteen 1950's rock-and-roll tunes is superficial, unfelt, and at times downright sloppy. The vocals are so far back in the instrumental soup that half the time one can't tell what song he's singing. Phil Spector is known for confused productions, but this is ridiculous."

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sold by mail order direct to consumers was because Lennon recognized that such a method would bypass the critics (Lennon deposition, pp. 248-249, read in on A. 3339). Lennon also realized that a "TV package" would be "a first" for an artist of his caliber (A. 3339).

In response to a request from Judge Griesa (A. 2640), defendants' lawyers evidently scoured the country for some favorable reviews and finally found a few in Lincoln, Nebraska and Van Nuys, California and in two relatively obscure publications entitled "TV Star Parade" and "Concert Magazine" (A. 3203-3204).

We submit there is little question that, on the whole, the album was not favorably reviewed and that Lennon's original fears came true. Zimmerman admitted that Lennon's preceding album, "Walls and Bridges" (which sold 425,000 copies), had "received a higher critical acclaim" (A. 2644). Even if one were to disregard the critical reviews of "Rock 'n' Roll", Posner conceded that "word-of-mouth" advertising among youngsters is very important (A. 3023), and it is certainly possible that once Lennon's fans started listening to "Rock 'n' Roll", they simply did not like it as much as albums containing his own compositions.

Any or all of the foregoing factors are likely to have influenced the sales of "Rock 'n' Roll". To the extent that these sales were less than some arbitrary standard, the trial record provided no basis for finding that such lower sales were the necessary, immediate and direct consequences of Adam VIII's and Levy's acts.

Defendants' other six methods of projecting "Rock 'n' Roll's" sales proved, on examination, to be equally unpersuasive.

Method No. 4 (a 750,000 projection in Capitol's fiscal 1975 budget prepared on February 28, 1974) was offered without any proof that such projections were substantially accurate and without any proof that the person who made the projection even knew about the then status of the "Rock 'n' Roll" album, which was actually in a state of total abandonment at that time (A. 2976). Indeed, Posner admitted that similar projections for other Lennon albums were way off the mark. For example, although the projection for "Sometime in New York City" was 493,000 for three months' sales (A. 2956), it turned out to have actual three months' sales of 293,000 (A. 2956) and total net sales after returns of only 164,000 (PX 110 at E 153). "Mind Games"

was projected at 600,000 units and ultimately sold 376,000 units to consumers (A. 2973). This sharp discrepancy between projected and actual sales led the trial judge to remark, "I attach very little weight to the 750,000 projection." (A. 3054.)

Defendants' Canadian projections

Methods Nos. 5-9* were based on Canadian sales. Plaintiffs objected to proof of such sales on the ground that defendants had offered no foundation with respect to the comparability and relevance of the Canadian experience (A. 2895).

Posner admitted on cross-examination that he was not personally familiar with Canadian retail prices (A. 3032), Canadian advertising (A. 3032), Canadian promotion methods (A. 3033), Canadian tastes (A. 3033-3037) and the state of the Canadian economy (A. 3037). In short, he was unable to lay any foundation for Capitol's attempt to compare the Canadian experience with its United States experience and to show whether defendants were comparing apples with apples or apples with oranges.

When Capitol failed to produce any further witnesses or evidence to show whether the Canadian and United States experiences were properly comparable, Judge Griesa finally observed:

"Look, Mr. Grannett [Capitol's counsel], while we were waiting for some telephoning at the beginning of the day, we had a discussion off the record. I indicated some doubts about the extent of proof with respect to the comparison with Canada." (A. 3129)

To overcome Judge Griesa's doubts regarding the Canadian comparison, Capitol then attempted to offer a telegram (DX DN for id.) from an officer of Capitol's Canadian subsidiary, apparently for the purpose of explaining the

* Method number 10 (a linear regression trend analysis), requires no discussion since it was withdrawn by defendants when their witness was unable to explain the method to the district court (A. 2917).

Canadian sales situation (A. 3129). Plaintiffs and Levy objected that the telegram was hearsay, and the court sustained their objection (A. 3131). Capitol then rested, without introducing any further evidence relating to the Canadian figures (A. 3132).

Nevertheless, during the summations* the trial judge indicated for the first time that:

"I think the evidence about the Canadian sales was quite interesting and convincing." (A. 3395.)

And in his findings and conclusions he stated:

"One factor that I think is of some considerable interest is the evidence that in Canada sales of the Rock 'n' Roll album were quite successful, and Canada did not experience the confusion of having Morris Levy's Roots album advertised on the Canadian television stations.

I don't consider the Canadian experience and statistics as conclusive, but I think they are of considerable interest and indicative, and they would indicate that sales in the United States would have been over 500,000 units if one were to project the Canadian sales on a statistical basis into the United States." (A. 3469.)

The judge then proceeded to rely on these Canadian statistics as a direct basis for his conclusion that United States sales should have been 442,000 instead of 342,000 (A. 3469).

While cross-examining Posner, the attorneys for plaintiffs and Levy focused on the most glaring deficiencies and

* The trial judge suddenly ordered oral summations as to the second phase of the case while in the middle of hearing the cross-examination of a witness in the third phase of the case (A. 3368). He announced his decision awarding damages of \$429,200 from the bench immediately following the oral summations and reacted with great impatience to the request of counsel for plaintiffs and Levy that he take the time to review the transcript references assembled in their post-trial brief which was rushed down to court and handed up to the judge while the summations were in progress (A. 3457-3458).

inconsistencies in the Canadian figures to show that they were meaningless in relation to United States sales (see A. 3028-3039). After the trial judge informed counsel that he would give little weight to the Canadian figures and after Capitol failed in its abortive attempt to lay a foundation by means of a hearsay telegram, plaintiffs and Levy, relying on the trial court's statement, saw no need to bring in independent evidence relating to the Canadian experience.* Consequently, they were especially surprised when, at the end of the trial, Judge Griesa based his computation of lost sales of 100,000 units (resulting in a damage award of \$200,500) in large measure on the Canadian figures (A. 3469).

We respectfully submit that Judge Griesa's receipt of the Canadian projections, for which no foundation had been laid, and his reliance on these projections in his assessment of damages were highly prejudicial errors which in and of themselves justify a reversal of his decision. In any event, we respectfully submit that there was no basis whatsoever in the record to support the trial court's conclusion that "Rock 'n' Roll" would have sold any more albums, let alone an additional 100,000 albums, but for the release and promotion of "Roots".

IV

Defendants failed to prove that they had to cut the price of their album in order to compete against "Roots".

The trial court awarded damages of \$160,732 to defendants because Capitol was allegedly forced to reduce the suggested retail price of its "Rock 'n' Roll" album from \$6.98 to \$5.98 in order to compete against the "Roots" album which was priced at an actual retail price of \$4.98.

* It should be noted that defendants did not disclose their reliance on the Canadian figures during discovery so that plaintiffs and Levy had no advance warning that such figures would be offered.

\$40,732 of that award was granted to Lennon for the royalties lost from the price reduction even though Lennon's counsel and pleadings had limited his request for monetary relief on his "property claims" to an accounting of Adam VIII's profits (A. 2344a35).*

However, as we show below, defendants failed to prove that the price cut was the necessary, immediate and direct consequence of the Adam VIII album.

When Menon testified in his deposition in May, 1975, just three months after "Rock 'n' Roll" was released, he gave three reasons for the price cut:

"Q. What was the basis for deciding to have a suggested retail price of \$5.98 for 'Rock 'n' Roll'?"

A. There were several considerations. Those that come to mind are, one, the condition of the marketplace in the first quarter of this calendar year, especially as it seemed to affect Capitol's sales, in addition to Capitol's beliefs about the general state of the industry sales, getting back to two months prior to the first quarter; that was one consideration.

The second consideration was the fact that all the titles or none of the titles, compositions recorded on this particular album were original new compositions that had not been exposed in terms of performances by other artists to the public before in fact, they had been exposed for public sales by performance of other artists of those compositions.

The fact that we had knowledge that an unauthorized, pirated version of this album was most likely to be exposed for sale to the public despite our forthright attempts to prevent this." (Menon deposition, p. 247 read in at A. 2488-2489.)

At trial, however, Menon reversed his emphasis by placing his third reason first (A. 2382-2383).**

* See footnote, p. 19, *supra*.

** When Menon's deposition testimony was called to Judge Griesa's attention by plaintiffs' counsel during summation, he re-

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Moreover, as the trial proceeded, it quickly became quite apparent that there was no legitimate need for Capitol to reduce its manufacturer's suggested retail price in order for "Rock 'n' Roll" to compete with "Roots". Zimmerman admitted that the actual retail prices to consumers (at both a \$6.98 and \$5.98 suggested retail price) are lower than the \$4.98 retail price charged for "Roots".

Suggested retail price of Capitol album	\$6.98	\$5.98
Wholesale price	\$2.73	\$2.90
Actual retail price to consumers	\$3.66-\$4.79	\$3.50 and up

(Zimmerman, A. 2579; 2678-2679; 2682; 2702.)

Plaintiffs and Levy offered exhibits showing that Capitol's regular "6.98" albums are advertised immediately after their release at \$3.88 or even \$3.69. See Lennon's "Walls and Bridges", advertised at \$3.88 (PX 226 at E 175) and former Beatle Paul McCartney's recent "Wings at the Speed of Sound", advertised at \$3.69 (PX 225 at E 174).*

Although Zimmerman claimed that many stores sold the album at higher prices, he admitted that over 90% of all records are sold for less than the suggested retail price (A. 2679), and that the retail price charged by stores that sell at a discount would *not exceed a high of \$4.79 per album* (A. 2702), which is less than the \$4.98 price at which "Roots" was sold.

The \$4.98 mail order price charged for "Roots" was a firm price not subject to discounts (A. 2692).

Thus, in determining whether "Roots" was the direct and necessary cause of Capitol's price reduction, the trial court

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plied: "I am afraid I have to say to you that I don't think Mr. Menon knew what he was talking about part of the time." (A. 3430.) The trial judge seemed to forget that Menon was Capitol's president and one of defendants' principal witnesses on damages and that defendants should have been bound by Menon's admissions.

* Both of these albums were released by Capitol with a suggested retail price of \$6.98.

should have compared not the "suggested" \$6.98 (Capitol) vs. the actual \$4.98 ("Roots"), but rather the actual retail prices offered to consumers, namely:

~~\$3.66-\$4.79~~ (Capitol) vs. \$4.98 ("Roots").

When confronted with the true comparison figures, Zimmerman's response was that Capitol did not know that the price of "Roots" would be \$4.98 (A. 2700) and that Capitol therefore had to reduce its suggested retail price from \$6.98 to \$5.98 in order to meet an unknown competitive price.

Zimmerman's testimony, however, was squarely inconsistent with earlier admissions by defendants.

Menon, the man who made the decision to cut the price (Zimmerman, A. 2699), knew at the time he made his decision on February 7 or 8, 1975 that "Roots" would be sold at \$4.98 (Menon, A. 2383).

Seider also knew that the price of plaintiffs' album would be \$4.98 (A. 2027).

And Capitol's general counsel, Tillinghast, knew on February 1, 1975 that "Roots" would sell at \$4.98 (Defendants' Amended Statement of Undisputed Facts, PX 102, ¶ 116 at E 138).

Moreover, Zimmerman himself admitted (A. 2685) that he knew that "Roots" was being sold at \$4.98 the moment the first "Roots" commercials appeared on television. The "Roots" advertisements first appeared on February 8, 1975 (Defendants' Amended Statement of Undisputed Facts [PX 102, ¶ 128 at E 141]); Capitol's album was not released until February 13, 1975, five days later.

In short, the evidence shows conclusively that Capitol knew that "Roots" would sell at \$4.98 and that the "Roots" price would therefore be higher than the ~~\$3.66-\$4.79~~ retail price range of Capitol's own "\$6.98" album.

Furthermore, Menon himself testified that there is no elasticity of demand between the "\$5.98 and the \$6.98 category" and that if Capitol had charged "\$6.98" instead of "\$5.98" there would have been no decrease in sales (A. 2513).

Zimmerman testified, however, that Capitol expected that "Roots" would be offered in retail chains as well as through mail order (Zimmerman, A. 2687), and during summation Capitol's trial counsel displayed to the district judge four Adam VIII albums which he claimed had been sold at "Jimmy's Music World" for \$1.99 (A. 3425). Judge Griesa indicated his reliance on this proof at A. 3426.

On August 2, 1976, Adam VIII and Levy moved to amend the district court's findings and conclusions or, in the alternative for a new trial on the ground, *inter alia*, that the evidence concerning "Jimmy's Music World" should not have been relied on by the district court (A. 210a) because it was presented by defendants during Phase I of the trial for entirely different purposes and had no probative value as to the retail price of "Roots" (A. 216a-221a). "Jimmy's Music World" sells dumped, obsolete records of all manufacturers (including Capitol) at bargain prices (A. 250a-251a).

In denying the motion, Judge Griesa stated, in contradiction to his earlier statement at A. 3426, that the "Jimmy's Music World" evidence "is of very little consequence as far as my decision was concerned." (A. 4256.)

But, if that is so, then there is no competent proof that "Roots" might have been sold in the regular course in retail stores at a price of less than \$4.98, which means that in cutting the suggested retail price, Capitol was knowingly reducing a consumer price range of \$3.66-\$4.79 to \$3.50 and up in order to compete against an album with a firm mail order price of \$4.98.

Whatever may have been Capitol's motivation for reducing its price, one thing is clear: it did not *have* to reduce its price in order to compete against "Roots" in the marketplace.

Defendants therefore failed to prove that plaintiffs' alleged tort in releasing and promoting "Roots" was the necessary, immediate and direct cause of the price reduction and Judge Griesa erred in awarding compensatory damages of \$105,000 to Capitol, \$15,000 to EMI and \$40,732 to Lennon, all based entirely on Capitol's price reduction.

V

Lennon failed to prove any compensable damages to his reputation.

There was no justification for the district court's award to Lennon of \$35,000 in additional damages for injury to his reputation and violation of his rights under the New York Civil Rights Law, Sections 50 and 51.

Lennon's proof of injury to his reputation consisted of some general testimony that he was appalled by "Roots", its cover and its commercial and that he had heard unnamed and unspecified persons make some adverse comments. Lennon admitted, however, that he had never actually listened to the "Roots" album (A. 972).

To the extent that the alleged injury to Lennon's reputation resulted in lower sales of Lennon's albums and therefore lower royalties to Lennon, Judge Griesa compensated Lennon (incorrectly, we contend) by his award of damages for lost sales.

To the extent that Lennon's claim is of a more general nature, we submit that this Court should consider three questions:

1. What is Lennon's reputation?
2. Did "Roots" really harm his reputation?
3. If so, how much is the harm worth?

Lennon complained that his photograph on the cover of "Roots" looked cheap and vulgar because it was a fuzzy enlargement. There is no claim that the picture was not a good likeness of Lennon (compare the contemporaneous photographs of Lennon in PX 92-PX 94*). Lennon's complaint seems to be addressed solely to the quality of the reproduction and the image that it conveyed to the public.

Lennon testified:

"I mean if I have pictures of myself going out, I

* As previously noted, Lennon admitted at the trial that PX 92 and PX 93 were fair representations of the way he looked in late 1974 and early 1975 (A. 1945-1946).

would like to have nice pictures. It is part of the music business. It is called your image." (Lennon, A. 3161.)

The evidence showed, however, that the pictures which Lennon has himself selected for public distribution are not always "nice" pictures. The fact that he selected them personally and that they were released with his consent does not alter the impact they may have had on the public.

The purpose of introducing into evidence Lennon's "Two Virgins" album (PX 3A)* and the very critical and hostile press reaction (PX 4A-4J) was not to emphasize or even criticize Lennon's nudity as such but simply to demonstrate to the trial court that Lennon does not really care about adverse public reaction.

Similarly the cover of "Unfinished Music No. 2, Life with the Lions" (PX 228), and the related "Rolling Stone Magazine" article (PX 4M), according to which the picture on the cover showed Lennon being arrested for drugs, were not offered for the purpose of stressing Lennon's drug arrest but rather to emphasize to the trial court that this was the type of image and reputation that Lennon wanted to convey to his public.

Lennon evidently thought it was clever to release an obscene and vulgar album cover or an album cover related to his drug arrest, without regard to the impact it might have on his image and reputation.

* "Two Virgins" had a cover showing complete frontal and rear nude views of Lennon and his wife, Yoko Ono. When Capitol and EMI refused to release the album, Lennon arranged for a separate company, Tetragrammaton, to distribute the album and insisted on continuing his distribution efforts even though such major chain stores as Korvette, Sears and Kresge refused to sell it, the district attorney of Essex County, New Jersey confiscated covers as pornography, and the Association of Record Dealers of New York and New Jersey:

"issued a statement '(taking) issue with the sensationalism of the John Lennon LP' and thanking manufacturers who recognize their responsibility and do not produce such material." ("Genitalia Slips Quietly Under the Counter", Rolling Stone Magazine, March 1, 1969, PX 4J at E 2.)

The album sold approximately 25,000 copies, compared to "Roots" sales of 1,270.

We do not for one moment question Lennon's right to put out anything he pleases—be it nude pictures of himself and his wife, sounds of sexual intercourse (in Lennon's "Wedding Album"), pictures relating to drug arrests, or anything that makes him happy. But the issue here is not Lennon's right to do so or his consent—it is the impact on the public.

We submit that the evidence demonstrated that Lennon has reached a point where his reputation is virtually impervious, or he believes it to be impervious to anything he does or that is done to him. This obviously does not mean that anyone should be entitled to use Lennon's name and picture without his consent and in an appropriate case an injunction may be the proper remedy. But it does mean that a court should be slow to award damages for injury to reputation in the absence of concrete proof that Lennon's reputation has indeed been harmed.

If the listeners or viewers of the "Roots" album and commercial were indeed offended—and there was not one shred of evidence that any member of the public did find them offensive—it still does not follow that Lennon's reputation was in any way impaired thereby.

We submit that Lennon simply failed to meet his burden of proof that he suffered any compensable injury to his reputation and that the trial court erred in awarding any damages for such injury.

Moreover, neither the trial judge nor Lennon's own counsel suggested any basis for computing the amount of damages. Lennon's counsel admitted candidly:

"Now, as far as the Section 51 claim, Your Honor asked before how do you place a figure on compensatory damages. I am not really sure I know the answer to that."* (A. 3404.)

* Lennon's attorney then advised the trial judge that the New York Supreme Court had, the previous day, awarded Norman Mailer \$25,000 for the unauthorized use, by a magazine, of Mailer's name and excerpts from his book on Marilyn Monroe (A. 3404). He neglected to inform the court that the defendant had defaulted and the award was uncontested. *Mailer v. The MacFadden Group, Inc.*, Supreme Court, New York County, Index No. 19417/75.

VI

Defendants, especially Lennon and his agent, Seider, failed to exercise reasonable care to avoid damages.

Section 918(1) of the *Restatement of Torts* states the general rule that a person injured by another's tortious conduct:

"is not entitled to recover damages for such harm as he could have avoided by the use of due care after commission of the tort."

This Court has reaffirmed its adherence to this rule in its recent decision in *Pearlstein v. Scudder & German*, 527 F.2d 1141, 1145 (2nd Cir. 1975), where it stated:

"There is no doubt but that a plaintiff who fails to avoid the consequences of a tort is disabled from recovering those damages which he could have reasonably avoided."

Even if this Court were to hold that defendants did prove that they sustained damages and that these damages were the necessary, immediate and direct result of the release and promotion of "Roots", the evidence showed that defendants, and particularly Lennon and his agent, Seider, failed to use due care to avoid such damages.

1. Lennon and Seider deliberately concealed from Capitol the facts concerning Lennon's dealings with Levy

Judge Griesa observed repeatedly, throughout both Phase I and Phase II of the trial, that Lennon's and Seider's concealment from Capitol of Lennon's dealings with Levy was a major cause of the injuries defendants suffered.

For example, during the summations following the end of the trial of Phase I of the lawsuit, the trial judge stated:

"Now, another thing—and I brought this up at the

trial—I have never felt that I was getting the complete story about what was going on in the minds of Seider and Lennon as far as their view of this deal. I am concerned about the fact that they never told Capitol anything about it. I am concerned about the fact that no answer was written to Mr. Levy's letter of January 9.* If I got that letter claiming a contract with me and if I didn't have a contract, I would get to my secretary so fast with a letter back to Levy denying that. I know I would have a messenger practically at the door carrying it there. It is inconceivable to me that that was not done." (A. 2281-2282.)

Similarly, during the February 27, 1975 hearing, held just one week after the trial judge rendered his decision on Phase I of the case, he stated:

"I think Lennon and Seider—I think as long as I put the decision on the books I will expand on it—it seems to me that they wanted to do this deal with Levy, and for reasons which I don't fully understand, maybe it was their exact degree of interest or a strategy on their part, they never said a word to Capitol and EMI about the specific thing for a period of three months, during which time all this was percolating and so forth. Now, I would say that the strain in relationships would not have developed if they had marched right out to Capitol and EMI and said, 'Listen, this is

* On January 9, 1975, Levy wrote the following letter to Lennon's attorneys:

"I was surprised, to say the least to receive your letter dated December 31, 1974. The stipulation of settlement entered into on October 14, 1973, was breeched by John Lennon and since that time this entire matter has been resolved during meetings with John Lennon, Harold Sider, (John Lennon's attorney) and myself. In accordance with the agreement reached during those negotiations, John Lennon has recorded sixteen (16) sides which I will market throughout the world by use of television advertising.

Please adjust your records to indicate that the original stipulation is no longer of any effect." (PX 31 at E 30.)

what we are interested in. What do you think?' The thing could have probably been resolved by October 10th." (A. 2344a53.)

During the trial of Phase II of the case, the trial court commented:

"... I would think there would have been a big difference to Capitol if Capitol had known on January 9th or January 13 or so, rather than on February 6, and I think it could have made approximately a month's difference in what Capitol did, whether it was file a lawsuit or produce its record, or whatever.

. . .

Now, it does seem to me to raise some questions about whether we should assess Levy for the damages caused by Capitol of having to rush into production about February 6 or so, and having to turn all its wheels in that brief moment. I mean, I really wonder if it is Levy's fault, and I'm focusing on the delay. I mean there are lots of things. I have already held that Levy had no right to issue the record and so forth and so on. But the question of the delay—delay isn't the right word—the question of damages flowing from the fact that Capitol was so rushed is a very serious question of who is responsible for that." (A. 2493-2494)

And Judge Griesa, noted, in his decision on Phase II of the case, that:

"... although the defendants have won this action, the fact that there has been a lawsuit, the fact that the parties have needed to come to court, is not entirely the fault of Levy. The dealings with Levy and his claims to be entitled to issue his Roots album were concealed from Capitol and from EMI by Seider long after they should have been revealed by him to these parties. If Seider had not dissembled in the way he did the problems that have arisen might have been solved quicker . . ." (A. 3476.)

Consequently, it is respectfully submitted that Lennon, who is responsible for his agent's misconduct, should not be permitted to recover damages that would not have occurred had he disclosed to Capitol and EMI the very dealings which Levy continually requested Lennon and Seider to discuss with Capitol and EMI.

2. Capitol could have tried to avoid the release of "Roots" as soon as it learned of plaintiffs' contentions

Menon at first tried to persuade the Court that Capitol did not learn of Levy's decision or consult its attorneys until February 6 or 7, 1975 (A. 2452, 2462).

It was only after he was confronted with Lennon's telegram of January 31, 1975 (DX YYY at E 484, A. 2501) and Klein's telephone call of January 30, 1975 (A. 2540) that Menon changed his story the next day to conform it to ¶ 112 of Defendants' Amended Statement of Undisputed Facts (PX 102) which states:

"On January 30, 1975, Menon heard from Klein on the telephone that Levy was intending to put out a Lennon album. Menon also heard this on the same date from Seider, and Menon told Seider that Capitol and EMI would pursue all available remedies if Levy took this step. On January 30th, 1975, upon his return to Los Angeles from New York City, Coury went to see Menon to tell him that Lennon had given final approval to production plans for the album. However he was informed, by Menon, who had been told by Klein, that Levy intended to distribute and sell the Roots album. Charles Tillinghast of Capitol called Lennon and Coury also spoke to Lennon." (E 137-138.)

Beginning January 30, 1975, what could defendants have done to stop the release of "Roots"?

(a) The least they could have done was to respond to Levy's attempts to talk to Capitol, EMI and Lennon in order to explain and discuss the situation. Instead, Menon not only refused to talk to Levy (PX 102, ¶ 99 at E 135)

but instructed Coury not to attend an already scheduled meeting with Levy (PX 102, ¶ 95 at E 134-135) and Lennon refused to return Levy's call (PX 102, ¶ 96 at E 135).

(b) Defendants could have applied for a temporary restraining order and preliminary injunction. There is a strong likelihood that a judge would at least have maintained the *status quo* until there had been an evidentiary hearing, especially since Levy and his companies would have been unable to show that maintenance of the *status quo* would cause them irreparable harm. At the very least, this would have given Capitol more time to prepare its own marketing program.

Defendants, however, decided to use "self-help" and economic muscle by sending threatening telegrams to Adam VIII's suppliers and TV stations. Then, instead of at least waiting just a few days to see if the telegrams would prove effective (as they were), they decided to immediately release Capitol's album at a lower price.

It is rather obvious that defendants had little faith in their legal position (perhaps because they realized that there was an explicit "mail order" exception in the Apple-Capitol contract) and elected to use their economic power in the marketplace.

To the extent that their decision resulted in any injuries (and we deny that it did), these injuries were self-inflicted wounds which resulted from defendants' failure to avoid damages.

Similarly, Capitol's failure to increase its television advertising for "Rock 'n' Roll" or to reinstate its normal suggested retail price for "Rock 'n' Roll" after "Roots" was withdrawn from the marketplace only three days after "Rock 'n' Roll's" release,* greatly increased the damages which defendants claim to have suffered.

* When the attorney for plaintiffs and Levy began to ask Menon as to whether Capitol had considered the possibility of raising the price back to \$6.98 once "Roots" went off the air, the trial judge interrupted, saying:

"The Court: Mr. Schurtman, it is impractical. Let's not grasp at straws." (A. 2511)

(footnote continued on following page)

As this Court recently stated in *Pearlstein v. Scudder & German, supra*, in discussing the rule of mitigation of damages:

"... it is equally unfair to charge S&G [the tortfeasor] with the consequences of what developed to be poor judgment on the part of Pearlstein [the party claiming damages]." (527 F.2d at 1146.)

We submit that all defendants and particularly Lennon and his agent, Seider, failed to mitigate their alleged damages and that the district judge erred in failing to deny damages or at least to reduce his award of damages to defendants.

VII

The Trial Court erred in awarding any punitive damages.

We contend, for the reasons hereafter set forth, that the district court erred in awarding Capitol, EMI and Lennon \$10,000 each in punitive damages against Adam VIII and Levy.

The legal standards for awarding punitive damages

Judge Griesa held that punitive damages would be

(footnote continued from preceding page)

He then permitted counsel to continue this line of questioning. Menon admitted that there had been industry wide price increases from \$5.98 to \$6.98 and the following questions and answers were given, again interrupted by the trial judge:

Q. When these price increases occurred, even though records were on the market which had been selling at 5.98, these same records were repriced at 6.98, is that

A. Yes, from various dates, yes.

Q. All right.

So it is feasible to change the price of an album in the middle of its promotion, isn't it?

The Court: That's such a different thing, Mr. Schurtman. Go to something else.

(A. 2512-2513).

awarded on the common law claims and under Section 51 of the Civil Rights Law.

The trial judge cited no legal authority in his written opinion and based his award entirely on a conclusion that:

"the issuance of the 'Roots' album by Levy did constitute a wilful act in conscious and wilful derogation of the rights of Capitol, EMI and Lennon." (A. 3574.)

Even assuming that the evidence was sufficient to establish that Levy acted in conscious and wilful derogation of defendants' rights (and we submit that it was not), the legal standards applied by the trial judge to support his award of punitive damages fall far short of the standards required under New York common law and under Section 51 of the New York Civil Rights Law.

In *Walker v. Sheldon*, 10 N.Y.2d 401 (1961), a case involving an allegation that the defendants systematically defrauded plaintiffs and others into entering into disadvantageous contracts, the New York Court of Appeals held that punitive damages could only be awarded "where the fraud, aimed at the public generally, is gross and involves high moral culpability." (emphasis supplied) (10 N.Y. 2d at 405.)

Consequently, *Walker v. Sheldon* requires that two things be proved before punitive damages may be levied: first, that the misconduct be of a high degree of moral turpitude, defined by the Court of Appeals as "such wanton dishonesty as to imply a criminal indifference to civil obligations", 10 N.Y.2d at 405; and second, that the misconduct affect the public at large, and not just the individual who seeks the punitive damages.

Subsequent decisions have expanded the application of this two-pronged rule to other types of cases. In *James v. Powell*, 19 N.Y.2d 249 (1967), the Court of Appeals denied punitive damages in an action for interference with the collection of a judgment. There, too, it should be noted, the defendant's conduct involved fraud: Congressman Adam Clayton Powell was found guilty of making a fraudulent conveyance of real property. Moreover, Powell's

"wilfulness" was unmistakable. Powell was repeatedly found in contempt of court for deliberately frustrating the judicial process. Indeed, the Appellate Division caustically noted:

"As the long and ugly record in this matter shows, this failure to obey is consistent with the debtor's cynical refusal to honor his own promises together with a total disregard of any and all process that has been served upon him." (26 A.D. 2d at 295-296.)

In *American Electronics, Inc. v. Neptune Meter Co.*, 30 A.D. 2d 117 (1st Dept. 1968), the Appellate Division applied the "public interest" test to an action for unfair competition and misappropriation of property and denied punitive damages notwithstanding the following findings of facts:

"The record establishes by overwhelming proof that defendants wilfully and deliberately engaged in a conspiracy and a course of conduct which violated elementary standards of morality in the business community and secured for themselves at plaintiffs' expense a ~~patent~~ contract for the manufacture and installation of toll collection equipment on the Connecticut turnpike. The evidence discloses that defendants used their knowledge of plaintiffs' prices and confidential price proposals fraudulently obtained and thus were able to underbid plaintiffs. They appropriated plaintiffs' manufacturing information from stolen drawings, induced plaintiffs' employees and a subcontractor to violate restrictive agreements, and attempted to conceal their activities by artifice and subterfuge." (citations omitted) (Id. at 118-119.)

See also, *Huschle v. Battelle*, 33 A.D.2d 1017 (1st Dept. 1970), where the Appellate Division again denied punitive damages in an action for misappropriation of trade secrets.

This Court and the district courts of this Circuit have also been most restrictive in awarding punitive damages. Thus, for example, this Court has denied punitive damages in an action for malicious prosecution, *Williams v. City of*

New York, 508 F.2d 356 (2nd Cir. 1974), in securities fraud cases, *Flaks v. Koegel*, 504 F.2d 702 (2nd Cir. 1974), *Globus v. Law Research Service, Inc.*, 418 F.2d 1276 (2nd Cir. 1969), and *Green v. Wolf Corp.*, 406 F.2d 291 (2nd Cir. 1968), and in an action arising out of the manufacture and marketing of a harmful drug, *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2nd Cir. 1967). *Szekely v. Eagle Lion Films, Inc.*, 140 F.Supp. 428 (S.D.N.Y. 1956), aff'd, 242 F.2d 266 (2nd Cir. 1957) and *Nash v. Alaska Airlines, Inc.*, 94 F. Supp. 428 (S.D.N.Y. 1950), both denied plaintiffs punitive damages in actions for misappropriation of literary property and common law copyright infringement, suits directly analogous to the pending litigation.

Moreover, the same rules prevail in cases involving the rights of privacy and publicity, the substance of Lennon's claims under the New York Civil Rights Law. See, e.g., *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (SDNY 1975), and *Roberts v. Conde Nast Publications, Inc.*, 286 A.D. 729 (1st Dept. 1955).

Adam VIII and Levy did not act wilfully, wantonly, maliciously or with recklessness bordering on criminality

Adam VIII and Levy did not act wilfully, wantonly, maliciously or with recklessness bordering on criminality.

They did not "pirate" Lennon's recordings. They made their album from a tape which Lennon personally caused to be delivered to Levy and did so in reliance on what they believed to be an enforceable oral agreement. Levy gave Lennon written notice, through his attorneys, a month before the release of "Roots", of Levy's claim to have the right to manufacture and sell an album of Lennon's rock and roll performances. See Levy's letter of January 9, 1975 to David Dolgenos, Esq., PX 31 at E 30, which was never answered by defendants.

Contrary to the district court's conclusions, Levy and Adam VII did not proceed in reckless disregard of defendants' rights. They believed in good faith, based on Levy's

discussions with Lennon and Seider at the Cavallero meeting and Lennon's subsequent conduct and statements, that Levy had made a "deal" with Lennon and Apple. Indeed, Judge Griesa himself made a finding that at least a "tentative agreement" had been reached at the Cavallero meeting so how can it be said that Levy acted maliciously and recklessly in construing the Cavallero negotiations, as confirmed by the subsequent actions and statements of Lennon, as having resulted in a binding contract.

In assessing punitive damages, the trial court emphasized that Levy had no right to rely on what Klein had told him about the mail order exception in the Apple-Capitol contract and on Klein's interview in "Playboy" magazine.

However, what Klein told Levy was said not during a casual conversation but in the context of serious negotiation which Klein undertook in his then capacity as Manager of the Beatles with Levy for the production of a Beatle television package (Klein, A. 1575-1576).

As for Levy's brief reference to his reading of "Playboy" magazine (Levy, A. 454), which simply corroborated what Klein had told Levy during the business negotiations, we respectfully point out that "Playboy" interviews, as perhaps distinguished from the magazine's pictorial content, are widely respected as serious journalism. Interviews have included such prominent figures as Governors Brown and Carter, Senators Percy and McGovern, Jawaharlal Nehru, Fidel Castro, Milton Friedman, John Kenneth Galbraith, Albert Schweitzer, Jean-Paul Sartre, Bertrand Russell, Rev. William S. Coffin, Admiral Elmo Zumwalt, Jean Genet, Vladimir Nabokov and the Beatles.

Moreover, the evidence showed that what Klein had told Levy and "Playboy" was true. The Apple-Capitol contract did contain an express exception for mail order sales (DX C-2 at E 249).

Once Seider told Levy in late January 1975 that defendants contended there was no "deal", Levy made numerous efforts to discuss the matter with Capitol, EMI and Lennon. Levy's calls were not accepted or returned and even a scheduled meeting between Levy and Coury of Capitol was

called off upon order of Menon. The first communication which plaintiffs or Levy thereafter received from any of the defendants was a series of telegrams delivered on Monday, February 10, 1975, after "Roots" had already been released and advertised.

Even Judge Griesa stated:

"The dealings with Levy and his claims to be entitled to issue his 'Roots' album were concealed from Capitol and from EMI by Seider long after they should have been revealed by him to these parties. If Seider had not dissembled in the way he did the problems that have arisen might have been solved quicker with either simpler or no litigation." (A. 3476.)

Moreover, even if Adam VIII and Levy violated §§ 50 and 51 of the Civil Rights Act, they did not do so in bad faith, but rather as a result of mistake or misapprehension of evidence of approval. It is important to note § 51 does not categorically require that *written* permission be granted for the use of a person's name and likeness. The section specifically exempts from that requirement persons who use:

"the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith."

Adam VIII and Levy assumed that Lennon had granted them a license to release his musical production and that they therefore had the right to use his name and picture in connection with such production.

Adam VIII and Levy did not seek to injure Lennon's reputation. They asked him to edit the "Roots" album, to design its cover and to appear in its advertisements but Lennon refused to respond to their request.

Finally, Adam VIII and Levy did not seek to defraud the public. They advertised precisely what they sold: an album of performances recorded by Lennon. Consequently, Adam VIII's and Levy's alleged misconduct did not injure the public at large.

**The punitive damages awarded
are excessive and unnecessary**

Even if punitive damages were legally permissible in this case, which we deny, the district court abused its discretion in awarding them because they serve no useful function here. Adam VIII and Levy need no further "punishment" to deter them from misappropriating property in the future. The district court assessed "compensatory" damages of \$389,800, plus interest and costs by reason of Adam VIII's and Levy's putting out an album which sold only 1,270 copies and on which Adam VIII *grossed* under \$7,000, which did not even begin to cover its out-of-pocket costs.

Indeed, it would seem that even the so-called compensatory damages were really punitive in nature and should also be reversed on that ground for the reasons set forth in this brief.

Conclusion

For the reasons set forth above and in the separate brief of Big Seven and Adam VIII, the judgment awarding defendants compensatory and punitive damages on their counterclaims should be reversed in all respects.

Dated: November 19, 1976

Respectfully submitted,

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(60717)

United States Court of Appeals
For the Second Circuit

Big Seven Music Corp. and Adam VIII, LTD.,
Plaintiffs-Appellants,

against

John Lennon, Apple Records, Inc., Harold Seider,
Capitol Records, Inc. and EMI Records Limited,
Defendants-Appellees,

and

Morris Levy,
Additional Defendant on Counterclaim-Appellant.

**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Jerry N. Simmons

, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 25 Elliott Place Bronx, N.Y. 10452
That on Nov. 19, 1976, he served

One Appendix Volume 1-6 and one Exhibit Volume and two Briefs on
behalf of Plaintiffs-Appellants and Additional Defendant on
Counterclaim-Appellant.

On:

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One State Street Plaza
New York, N.Y. 10004

by delivering to and leaving same with a proper person or persons in
charge of the office or offices at the above address or addresses during
the usual business hours of said day.

Sworn to before me

19 day of November, 1976

JOHN M. J. [illegible]
Notary Public for the State of New York

Qualified to perform duties as a Notary Public
Notary Public for the State of New York, 1976